


VIRGINIA DEPARTMENT OF
ENVIRONMENTAL QUALITY

DEQ

Division of Enforcement

Memorandum

TO: Regional Enforcement Managers and Specialists, Regional Compliance Auditors,
Central Office Enforcement Managers (electronic distribution)

FROM: Melanie D. Davenport, Director 
Division of Enforcement

DATE: November 24, 2009

SUBJECT: Case Closure Text and Attachments

COPIES: Richard F. Weeks, James J. Golden, Regional Directors, Division Directors,
Central Office Compliance Managers, Jeff Reynolds, Angela Jenkins, Cindy
Berndt (electronic distribution)

Attached are revisions to Chapter 2, Part II of the DEQ Civil Enforcement Manual, dealing with Enforcement Case Closure, together with a form and model letter. Revising this part of the manual is a task in the agency's Strategic Plan for "achiev[ing] certain, consistent, and timely compliance and enforcement."

Enforcement staff began discussions of the text and form in its meeting last year, when it was requested that all regions follow the form and text as they existed. Nevertheless, a comprehensive revision became necessary. A draft of the revision was circulated in September of this year, and was discussed in an ensuing conference call and at the Enforcement meeting of October 15th. Another revisions and a comment-response document was circulated, and a final conference call was held November 19th. These discussions have resulted in agreement on the attached documents.

The principal changes are:

- Clarifying the bases for closing an enforcement case and rectifying inconsistencies between the previous form text and form;
- Clarifying that that an enforcement case is ordinarily closed only when facility has returned to compliance and any enforcement instrument is ready to be terminated. A new model termination letter is provided for consistent use;
- Reiterating that an enforcement case may also be closed in limited circumstances when ongoing violations have ceased and further enforcement action will not practicably lead to further compliance or payment of an appropriate penalty. This should help concentrate enforcement efforts productively. For consistency, Division of Enforcement concurrence as to substance is necessary for these "Administrative Closures/Dereerrals."
- An approval box for the form has been moved to the top, so that it is readily apparent.

If you have any questions, please call John Ely at x4249.

Attachments

II. ENFORCEMENT CASE CLOSURE

DEQ may close an enforcement case when: (1) an appropriate enforcement action is complete, and the responsible party (RP) has returned the facility to compliance on the issues for which it was referred; or (2) no enforcement action will practicably lead to further compliance or payment of an appropriate civil charge. Staff use the same Enforcement Case Closure Memorandum (Memorandum) for both types of closure (attached).

A. RETURN-TO-COMPLIANCE CLOSURE

An enforcement case qualifies for return-to-compliance closure when all the terms of any appropriate enforcement instrument have been completed, and the RP has returned the facility to compliance on the issues for which it was referred. Regional enforcement staff, in consultation with compliance, permitting, or other staff, ascertain whether the party has fulfilled all of the terms of any Letter of Agreement (LOA), Consent Order, or other enforcement instrument. The terms may include obtaining permits, submitting and implementing plans, paying civil charges and fees, reimbursing costs, or completing other requirements. Where compliance status can change quickly (e.g., DMR violations), staff should confirm that the return to compliance is durable.

To close a case, regional enforcement staff fill out the Memorandum, attach supporting documentation, obtain the necessary concurrences, and forward the Memorandum and attachments for approval. The Memorandum identifies the Facility/RP, the media and program, the permit or other identifying numbers, the violations addressed, the date of the order or other enforcement instrument, and the reason for the closure. The Memorandum should be accompanied by supporting documentation (e.g., a checklist, database printout, inspection report, or memorandum from staff) clearly showing that all requirements of any enforcement instrument have been completed. A draft letter terminating any LOA, Executive Compliance Agreement (ECA) or administrative Order should also be attached, so that the entire matter is brought to management at one time and the RP is notified of the termination.¹ A model letter is attached. Division of Enforcement (DE) concurrence is not necessary for return-to-compliance closure. Once the Memorandum is complete, staff forward it for approval. DEQ may have to bring Water Consent Orders before the Water Board for termination, depending on the terms of the Order.

After the Memorandum is approved, regional enforcement staff place it in the file of record, together with a copy of any letter from the Regional Director (RD) or Deputy Regional Director (DRD) notifying the RP that the enforcement instrument has been terminated. Copies of the Memorandum and letter should be sent to permitting or compliance staff and, for consent or other orders and ECAs, to the Division of

¹ A separate letter to the RP may not be necessary for an "informal action" (e.g., if (1) no order is necessary or appropriate; (2) enforcement staff have not entered substantial negotiations with the RP; and (3) other DEQ staff have sent a subsequent report or letter acknowledging that the violations have been corrected). Only a court can terminate a judicial order.

Enforcement (DE) to update its records. Regional enforcement staff should also update the relevant databases.

B. ADMINISTRATIVE CLOSURE/ DEREFERRAL

In limited circumstances, DEQ may also conclude an enforcement action administratively and close the enforcement case without a full resolution, when no enforcement action will practicably lead to further compliance or payment of an appropriate civil charge. Regional enforcement staff should document that they have obtained as much progress toward full compliance as possible - the enforcement action should at least abate any continuing unpermitted or illegal activities. Reasons for Administrative Closure/Dereferral include, but are not limited to:

- The RP has ceased continuing, non-compliant activities, and no enforcement action will lead to further compliance or payment of an appropriate civil charge. For example, a person has stopped illegally dumping solid waste, and although a deed notation has been filed and the waste covered, the person has a documented lack of resources to complete closure or pay a civil charge.
- The facility has closed permanently, and DEQ is unable to pursue enforcement as a result.
- There are no liable, viable or identifiable parties to take an enforcement action against.
- DEQ has taken or considered all administrative enforcement actions, and none have or will result in compliance, and a referral for judicial enforcement is not appropriate.
- Upon further investigation, there is not sufficient evidence to pursue the violation(s) in an enforcement action.

In closing a case administratively, regional enforcement staff prepare a Memorandum in the same manner as for Return-to-Compliance Closure. The Memorandum and attachments should document efforts to obtain full compliance. Consultation and concurrence are required as before, except DE concurrence as to substance is needed to close a case administratively. If DE does not concur, it should state the basis and offer a path to resolution. Since no enforcement action is being taken, there is generally no requirement to notify the party. However, if the case is being closed for insufficient evidence and substantial negotiations have occurred, the RP should be notified that DEQ is not pursuing the matter at this time. Administrative closure does not limit DEQ's authority to reopen a case should circumstances change or new information be found. As before, regional enforcement staff should send copies and update the relevant databases upon approval.

Administrative closure is not appropriate for RCRA cases designated as SNC, unless DEQ has explored all enforcement avenues and EPA agrees with the decision not to pursue the case further.

ENFORCEMENT CASE CLOSURE MEMORANDUM

TO: File

FROM: [Regional Enf. Specialist]

THROUGH: [Regional Enf. Manager]

DATE: _____

Case Closure approved

By _____
(RD or DRD)

Date _____

RE: Facility: _____

Responsible Party (RP): _____

Location and/or address: _____

Background Information:

Media/Media Program: _____

☐ Permit No.: _____

☐ Complaint No.: _____

☐ Registration No.: _____

☐ Other: _____

Date referred: _____

NOV date: _____

Facts/Violation(s): _____

Reason for Closure:

☐ Compliance achieved through informal action (date); order not required or appropriate (include Justification).

☐ Letter of Agreement issued (date). All terms complied with.

☐ Consent Order/ECA issued (date). All terms complied with.

☐ APA Order issued (date). All terms complied with.

☐ OAG or EPA action issued (date). All terms complied with.

☐ Administrative Closure/Dereferral (use checkbox for Basis and include Justification)

Basis for Administrative Closure/Dereferral:

- ☐ RP has ceased continuing, non-compliant activities, and no enforcement action will lead to further compliance or payment of an appropriate civil charge.
- ☐ Facility has closed permanently, and DEQ is unable to pursue enforcement.
- ☐ There are no liable, viable or identifiable parties to take an enforcement action against.
- ☐ No administrative enforcement actions have or will result in compliance, and judicial enforcement is not appropriate.
- ☐ Upon further investigation, there is not sufficient evidence to pursue the violation(s) in an enforcement action.
- ☐ Other (use Justification)

Justification: _____

Recommended by: _____
Name Title Date

Concurrences:

Deputy Regional Director Date

Regional Enforcement Manager Date

☐ CO Media Enf. Manager - Date: _____
(for Administrative Closure/Dereferral only)
(attach documentation)

Attachment(s)

Copies: Regional Compliance Manager
Division of Enforcement [for Adm. Closure or termination of Order or ECA]

Model Letter for Terminating a Consent Order

[Letterhead]

[Date]

[Contact Name]

[Contact Title]

[RP Name]

[Address 1]

[Address 2]

RE: Termination of Consent Order of [effective date or order]

Dear [Contact Name]:

The [State Air Pollution Control Board/State Water Control Board/ Virginia Waste Management Board/DEQ] issued a Consent Order ("Order") to [RP] on [date]. Section E.11(b) of the Order states that the Order may be terminated by the Director of the agency upon 30 days' written notice. According to our information, the requirements of the Order have been completed. Therefore, this letter gives notice that the Order will terminate 30 days from this date.

Termination of this Order does not relieve [RP] from the obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or other applicable requirement.

Thank you for your cooperation in resolving this matter. If you need additional information about this letter, please contact [DEQ Contact], [Title], at [telephone number].

Sincerely,

[Regional Director]
Regional Director

cc: [File]
[DEQ Contact]